

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

September 12, 2008 Session

MARY AGNES FAGG v. HELEN C. BUETTNER

Appeal from the Circuit Court for Davidson County

No. 05C-1778 Barbara N. Haynes, Judge

No. M2007-02748-COA-R3-CV - Filed November 10, 2008

In this action against an uninsured motorist, the trial judge dismissed the defendant insurance company from the lawsuit on the ground that plaintiff failed to fulfill her obligation to serve process upon the uninsured motorist pursuant to Tenn. Code Ann. § 56-7-1206. The defendant insurance company filed a motion to dismiss after plaintiff failed to file a fourth summons on the uninsured motorist within one year of the last unsuccessful attempt when plaintiff's first three attempts to obtain service of process on the uninsured motorist were returned "not to be found in my county." The trial court found that plaintiff's claims against the uninsured motorist were barred by the statute of limitations, dismissed the claims against the motorist, and subsequently granted the defendant insurance company's motion to dismiss. We have determined plaintiff fulfilled the obligations of Tenn. Code Ann. § 56-7-1206 and therefore, the trial court improperly dismissed plaintiff's claims against the defendant insurance company.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed and Remanded**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Larry L. Roberts and Amanda Raye Thornton, Nashville, Tennessee, for the appellant, Mary A. Fagg.

David J. White, Jr., Nashville, Tennessee, for the appellee, State Farm Mutual Automobile Insurance Company.

OPINION

Mary Agnes Fagg (“Ms. Fagg”) filed a personal injury action against Helen C. Buettner on June 15, 2005, for damages allegedly sustained as a result of a car accident that occurred on June 24, 2004.¹ On the same day, a summons was issued by the clerk to serve Ms. Buettner at the address provided on the police report. After attempting to serve the summons on Ms. Buettner, the Davidson County Sheriff returned the summons unserved on June 22, 2005, with a notation that Ms. Buettner was “not to be found in my county.” Contemporaneous with the filing of the Complaint, summons was also issued to State Farm Mutual Automobile Insurance Company in its capacity as Ms. Fagg’s uninsured motorist carrier. As required by the uninsured motorist statute, the summons and Complaint were served on State Farm through the Commissioner of Insurance on June 20, 2005.² State Farm filed an Answer to the Complaint on July 28, 2005.

On July 7, 2005, at the request of Ms. Fagg’s counsel, the clerk issued an alias summons to be served on Ms. Buettner at a different address on Bellevue Road in Nashville, Tennessee.³ The alias summons was returned unserved on July 13, 2005, with the following notation: “Helen C. Buettner is not to be found in my county. Does not reside.”

A year later, on July 13, 2006, again at the request of Ms. Fagg’s counsel, a pluries summons was issued by the clerk for service on Ms. Buettner at the same Bellevue address. The pluries summons was returned unserved by a private process server on July 14, 2006, with the following notation: “The defendant does not live at this address and has not lived there for 2-1/2 years, current resident . . . says she and her family have lived there for that long.” Thereafter, Ms. Fagg made no further efforts to serve Ms. Buettner, and the case was set to be tried on November 5, 2007.

On November 2, 2007, three days before the trial was scheduled to begin, State Farm filed a Motion to Amend Answer and a Motion to Dismiss. State Farm sought to amend its Answer to add the following defense:

The Plaintiff has not served a Summons or Complaint on the Defendant Helen C. Buettner and the one year statute of limitation for the cause of action alleged in the Complaint bars any recovery by the Plaintiff from the said Defendant.

In its Motion to Dismiss, State Farm contended:

Since the Plaintiff did not file another Pluries Summons on or before July 13, 200[7], the one year statute of limitation for the cause of action alleged by the Plaintiff in the

¹ According to the Complaint, Ms. Buettner was driving a car owned by Grace Fessey and struck Ms. Fagg’s car from the rear. Ms. Fessey subsequently filed for bankruptcy. She is not a party to this appeal.

² See Tenn. Code Ann. § 56-7-1201 et seq.

³ The Bellevue address was obtained by Ms. Fagg’s counsel from the Department of Safety.

Complaint bars her recovery from the Defendant, Helen C. Buettner. Since the Plaintiff is not legally entitled to collect from Helen C. Buettner, there is no basis for a recovery by the Plaintiff under the policy of insurance issued by State Farm Mutual Automobile Insurance Company.

After a hearing on the motions, the trial court granted both the Motion to Amend and the Motion to Dismiss. This appeal followed.

ANALYSIS

Ms. Fagg contends the trial court erred by dismissing her Complaint and insists that she is entitled to proceed against State Farm on the authority of Tenn. Code Ann. § 56-7-1206.⁴ We agree.

Tenn. Code Ann. § 56-7-1206(d) provides the following:

In the event that service of process against the uninsured motorist, which was issued to the motorist's last known address, is returned by the sheriff or other process server marked, "Not to be found in my county," or words to that effect, or if service of process is being made upon the secretary of state for a nonresident uninsured motorist and the registered notice to the last known address is returned without service on the uninsured motorist, the service of process against the uninsured motorist carrier, pursuant to this section, shall be sufficient for the court to require the insurer to proceed as if it is the only defendant in the case.

This court has previously addressed the relationship between this statute and the procedural rule on service. *Little v. State Farm Mut. Ins. Co.*, 784 S.W.2d 928, 929 (Tenn. Ct. App. 1989); *Lady v. Kregger*, 747 S.W.2d 342, 343-45 (Tenn. Ct. App. 1987). The uninsured motorist statute does not permit a direct action against an insurance carrier, *Little*, 784 S.W.2d at 929; nevertheless, the uninsured motorist statute, Tenn. Code Ann. § 56-7-1206, "allows for actions to be pursued against the uninsured motorist carrier as the sole defendant where . . . service of process upon the motorist sought to be charged is returned 'not to be found.'" *Lady*, 747 S.W.2d at 344 (citing Tenn. Code Ann. § 56-7-1206(d)). "The only other condition to the uninsured motorist carrier assuming the defense is that service of process against the uninsured motorist carrier must have been executed pursuant to the guidelines set out in the section." *Id.*

In *Lady*, the plaintiffs filed suit against two individual defendants for injuries sustained in an automobile accident and process was returned unserved with the notation "not to be found." *Id.* at 343. The plaintiffs' uninsured motorist carrier, Transamerica, was subsequently added and service of process issued. *Id.* Although the two individual defendants' whereabouts were ascertained over a year later, at which time they were served with alias process, no alias process had been issued

⁴The parties do not dispute that the uninsured motorist statute, including Tenn. Code Ann. § 56-7-1206, applies in this case.

against the individual defendants since the return of the original complaint and summons. *Id.* The individual defendants then filed motions for summary judgment on the grounds that the action against them was barred by Tenn. R. Civ. P. 3, and the uninsured motorist carrier subsequently filed a motion on its behalf contending that if no cause of action existed against the original defendants due to the running of the statute of limitations, then it too should be dismissed from the lawsuit. *Id.* The trial court granted both motions. *Id.*

In holding it was error for the trial court to dismiss the action against the uninsured motorist carrier, this court found that the plaintiffs had “perfected their action against Transamerica as uninsured motorist carrier by complying with the conditions of Tenn. Code Ann. §56-7-1206.” *Id.* at 344. This court further explained:

The intention of the Legislature in enacting T.C.A. § 56-7-1206 was to provide an efficient procedure whereby the Plaintiffs could obtain complete relief when injured by an uninsured motorist. Subsection (d) is the procedure required to perfect a direct action against the uninsured motorist carrier when the whereabouts of the alleged uninsured motorist are unknown. Subsection (e) sets out the procedure required to add the alleged uninsured motorist to the subsection (d) proceeding when his whereabouts are ascertained. Suspension of the T.R.C.P. Rule 3 requirement, that alias process be issued every six months or that the action be filed yearly, during the subsection (d) proceeding, is consistent with the legislative intent to provide an efficient procedure.

Id. at 345.

In a second uninsured motorist case in which service on the individual defendant was twice returned marked “unable to locate,” this court vacated the trial court’s dismissal of the action against the uninsured motorist carrier. *Little*, 784 S.W.2d at 929. The trial court found that the plaintiff’s failure to obtain issuance of “new process” as required by Tenn. R. Civ. P. 3 barred the action against the uninsured motorist and the uninsured motorist carrier. *Id.* In vacating the trial court, this court explained that requiring the plaintiff to obtain service on the uninsured motorist or “reissuing process from time to time indefinitely” was “not the intention of the legislature.” *Id.* We find the decisions in *Lady* and *Little* to be controlling in the present case.

Ms. Fagg made three attempts to serve process on Ms. Buettner, all of which were unsuccessful. The first attempt was made on Ms. Buettner at the address listed in the police accident report. Because Ms. Buettner was not found at the address provided on the police report, Ms. Fagg’s counsel inquired with the Department of Safety to obtain another address where Ms. Buettner might be served. The Department of Safety provided Ms. Fagg’s counsel with the address in Bellevue, which counsel used in his attempts to obtain service via the alias and pluries summons. Although Ms. Fagg used the Sheriff’s Department and a private process server in her attempts to obtain service of process on Ms. Buettner at two different addresses, each of the three summons were returned with notation to the effect that Ms. Buettner was not to be found. As this Court explained in *Lady*, Ms.

Fagg was not required to continue her attempts to serve process when previous dutiful attempts were returned “not to be found.”

State Farm’s contention that Ms. Fagg had a never ending duty to continue her efforts to serve Ms. Buettner is based on three cases, each of which is distinguishable from the present case. In the first case, *Ballard v. Ardenhani*, 901 S.W.2d 369 (Tenn. Ct. App. 1995), the issue was whether plaintiff’s failure to comply with Rule 3 was excused by the provisions of Tenn. Code Ann. § 56-7-1206(d) and (e). This court found that the plaintiff in *Ballard* had failed to establish that the motorist involved in the collision was uninsured. *Ballard*, 901 S.W.2d at 371. Further, we found that the fact that no process was served upon the uninsured motorist carrier until more than one year after the initial suit was filed indicated that when the plaintiff filed the initial suit he did not intend to rely on uninsured motorist coverage.⁵ *Id.*

The second case relied upon by the trial court and State Farm is also distinguishable from the present case. In *Winters v. Jones*, 932 S.W.2d 464, 465 (Tenn. Ct. App. 1996), the plaintiff issued process against the executor of the deceased tortfeasor’s estate. However, the plaintiff only attempted to serve the executor’s attorney, not the executor himself. *Winters*, 932 S.W.2d at 465. The attorney refused to accept service of process for the executor, and no further attempts at service on the executor were made. *Id.* In affirming the trial court’s dismissal of the plaintiff’s action, we found the plaintiff could not proceed directly against the uninsured motorist carrier pursuant to Tenn. Code Ann. § 56-7-1206(d) because “even though [the plaintiff] managed to elicit a ‘not to be found in my county’ response on the return of process, *she did not serve, or attempt to serve, the responsible party at his last known address.*” *Id.* at 466 (emphasis added). *Winters* is, therefore, distinguishable because Ms. Fagg not only attempted to serve the responsible party at her last known address, but in fact made three attempts at two different addresses obtained from the police accident report and the Department of Safety.

In the third case, *Webb v. Werner*, 163 S.W.3d 716, 717 (Tenn. Ct. App. 2004), the plaintiff obtained the issuance of summons to be served on the uninsured motorist; however, there was no evidence that the plaintiff made any effort to obtain service of process on the motorist’s last known address.⁶ *Webb*, 163 S.W.3d at 719. Furthermore, no additional summons was issued for almost two years. *Id.* In affirming the trial court’s finding that the plaintiff’s action was barred by the one year statute of limitations, we found that

while Tenn. Code Ann. § 56-7-1206(d) allows a plaintiff to proceed directly against an uninsured motorist carrier under certain circumstances even if the uninsured motorist is never successfully served with process, *see Brewer v. Richardson*, 893 S.W.2d 935 (Tenn. 1995), a plaintiff is still required to make a duly diligent effort

⁵The parties do not dispute that the uninsured motorist statute applies, and Ms. Fagg followed the requirements of Tenn. Code Ann. § 56-7-1206 and promptly served State Farm in accordance with the statute.

⁶The uninsured motorist’s last known address was in Switzerland. *Webb*, 163 S.W.3d at 717.

to serve process on the uninsured motorist, and when this diligent effort is lacking and an unreasonable amount of time has passed, a plaintiff cannot use the uninsured motorist statute to avoid the requirements of Tenn. R. Civ. P. 3.

Id. at 720-21.

The contention advanced by State Farm in this case “would hold a plaintiff hostage to the requirement of obtaining service on the uninsured motorist or reissuing process from time to time indefinitely, which was not the intention of the legislature.” *Little*, 784 S.W.2d at 929. Ms. Fagg made a diligent effort to serve process on the uninsured motorist. In fact, she made three diligent efforts, all of which were returned with a notation to the effect of “not to be found.” Requiring Ms. Fagg to continue to issue service of process in order to proceed against the uninsured motorist carrier as the sole defendant would undermine the purpose of Tenn. Code Ann. § 56-7-1206 of providing an efficient procedure by which Ms. Fagg may obtain relief.

Accordingly, we have determined that the trial court erred by dismissing Ms. Fagg’s claim against State Farm.⁷

IN CONCLUSION

We therefore reverse the judgment of the trial court and remand for further proceedings consistent with this opinion. Costs of appeal are assessed against State Farm.

FRANK G. CLEMENT, JR., JUDGE

⁷ Ms. Fagg raised additional issues in her brief, however, our ruling on appeal renders all other issues moot.